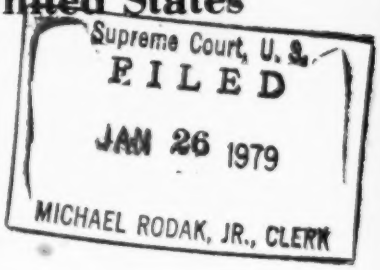
In the Supreme Court of the United States



OCTOBER TERM, 1978

No. 78-735

JOE PENNINGTON,
Petitioner,

vs.

STATE OF KANSAS, MILDA R. SANDSTROM, and F. T. (JIM) CHAFFEE, SHERIFF OF SHAWNEE COUNTY, KANSAS,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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and F. T. (Jim) Chaffee

January, 1979

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(B) The Decision Below Does Not Conflict With This Court's Holding In *Branzburg v. Hayes*, supra.

(C) The Decision Below, Convicting Petitioner of Direct Criminal Contempt, does *not* Conflict With This Court's Holdings in *In Re Oliver*, 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1947); *Cooke v. United States*, 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925) and *In Re Ferris*, 175 Kan. 704, rev., 348 U.S. 933, 99 L.Ed. 732, 75 S.Ct. 355 (1955).

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JURISDICTION

The judgment of the Kansas Supreme Court was entered July 21, 1978. A Motion for Rehearing was timely filed, but denied on September 5, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the First Amendment to the Constitution of the United States confers a conditional privilege on a television news reporter to protect the identity of a confidential informant, who gave a hearsay account of a certain witness' threat upon the life of the ultimate murder victim, where:

(a) The reporter, before the murder trial of the victim's wife, voluntarily disclosed to both the State and counsel for the defendant the entire content of the hearsay information given by the confidential informant;

(b) The State, which did not seek the name of the Informant, other than to support the defendant's request for it, acknowledges that the identity of the informant would not bear directly on the guilt or innocence of the defendant.

(c) The defendant wife, whose sole defense at trial was insanity, made no other effort to discover the identity, advanced no need for such disclosure, and declined to inquire of or cross-examine the witness as to his reported threat on the life of the decedent; and

(d) The trial court's only reason for compelling the reporter to disclose was that the defendant wife was charged "for the most serious of offenses."

2. Whether the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the concurrent conviction and sentencing of an individual for direct criminal contempt when the contemptuous act, conviction and sentencing all occur in chambers and are closed to the public.

STATUTORY PROVISIONS INVOLVED

We do not disagree with those provisions as stated by the petitioner.

STATEMENT OF THE CASE

We do not disagree with the chronologically listed sequence of events. Additionally we would add the following:

1. That shortly after the conviction of Murder, Mr. Robert Hecht's employment by the defendant was terminated. Subsequently she retained the services of Mr. Russell Shultz, 1333 N. Broadway, Wichita, Kansas, who, to the best of our knowledge, continues to represent her.

REASONS FOR NOT GRANTING THE WRIT

(A) Petitioner Contends There Is Uncertainty Among Numerous State and Federal Courts As to When, and Under What Circumstances, a Court Should Require a News Reporter to Disclose the Identity of a Confidential News Source in a Manner Compatible With the First Amendment to the Constitution of the United States Where the Information Supplied by the Source Has Been Previously Disclosed to All Parties.

Since the decision handed down in *Branzburg v. Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972), at least 20 courts of appellate jurisdiction have had occasion to interpret and apply the law of that case. Apparently only two of those have concluded that a news reporter has *no* privilege under *Branzburg*. *[Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. den., 434 U.S. 930 (1977); and *Dow Jones v. Superior Court*, 364 Mass. 317, 303 N.E. 2d 847 (1973).]

Kansas has followed the vast majority of courts and recognized a limited privilege for newsmen under the *Branzburg* holding.

Where no privilege was recognized *(Caldero*, supra) this court denied certiorari, Kansas' decision recognizes a privilege but just did not feel it applied to this newsman. If the finding of no privilege does not merit review we fail to see why review should be granted in a case that recognizes a privilege.

This case is markedly different than any of the three cases decided in *Branzburg*, supra. It is not that different, however, from *United States v. Liddy*, 478 F.2d 586 [D.C. Cir. 1972] except that the information was known here and the informant not known while there the informant was known but not the information.

It hardly seems that review is justified to try to make a distinction between disclosure of the name of an informant and the confidential information provided by that informant.

This is a case, where the constitutional issues pit a claimed First Amendment privilege against Sixth Amendment fair trial requirements. This case is not new in dealing with that confrontation and is not, on that ground worthy of review. [See *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976); *United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972); *United States v. Orsini*, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), aff'd 559 F.2d 1206 (2d Cir. 1977), cert. denied ____ U.S. ____, 54 L.Ed.2d 491, ____ S.Ct. ____; *United States v. Liddy*, 354 F. Supp. 208, 215 (D.C. Cir. 1972); *Rosato v. Superior Court of Fresno County*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); *Farr v. Superior Court, County of Los Angeles*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), cert. denied 409 U.S. 1011, 34 L.Ed.2d 305, 93 S.Ct. 430 (1972); *Morgan v. State*, 337 So.2d 951, 954 (Fla. 1976); *Morgan v. State*, 325 So.2d 40, 43 (Fla. App. 1975); *People v. Marahan*, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (1975).]

Petitioner asks for review because it "has been a continuing source of controversy and litigation." This may be true but review of this case is unlikely to change this. Unless this court would rule that there is no privilege at all or that there is an absolute privilege then the litigation of the subject is likely to continue regardless of any decision that might be made in this case.

(B) The Decision Below Does Not Conflict With This Court's Holding In *Branzburg v. Hayes*, supra.

The *holding* in *Branzburg* apears to be this:

Newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation, and requiring them to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment.

Obviously there is much other useful discussion and some explanation of what the case does not hold. There is no interposing of a Constitutional standard for determining what is relevant and what is not.

In this case the trial court found the information sought to be sufficiently relevant to require its disclosure. On review the Kansas Supreme Court, interpreting this to be a discovery proceeding, said:

> "The scope of discovery is to be liberally construed so as to provide the parties with information essential to litigation to insure defendant a fair trial; therefore, the scope of relevancy in a discovery proceeding is broader than the scope of relevancy at trial. Relevant evidence in discovery may include information which is not admissible at trial, but which appears to be reasonably calculated to lead to the discovery of admissible evidence."

The State does *not* concede that the evidence was not relevant at all. The State concedes only that the information sought does not bear directly on the guilt or innocence of Milda Sandstrom and is not relevant to that issue.

On the contrary, the information divulged by Mr. Pennington would lead one to believe that Mr. Winder, the State's chief witness, had possibly been engaged in a homosexual relationship with the now deceased. That an accusation had been made by him against the now deceased, Mr. Sandstrom, that Mr. Sandstrom was seeing someone else. He allegedly made a death threat against Mr. Sandstrom.

If the informant's name was known, the defendant then would have had the opportunity to find the person who heard the threat. With that he would have possibly had an opportunity to show bias, prejudice or interest of the State's chief witness. Without the informant's name the defendant could not find out who was at the party to hear of the relationship and the threat and would not be able to make such a challenge of the witness.

With this in mind it can't be said that the informant's name was completely irrelevant to the case.

(C) The Decision Below, Convicting Petitioner of Direct Criminal Contempt, does *not* Conflict With This Court's Holdings in *In Re Oliver,* 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1947); *Cooke v. United States,* 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925) and *In Re Ferris,* 175 Kan. 704, rev., 348 U.S. 933, 99 L.Ed. 732, 75 S.Ct. 355 (1955).

The facts in the instant case are not remotely similar to the factual situation presented in *Oliver,* supra. In that case a unique "judge—one-man grand jury" system had led to a witness being summarily punished for contempt because the judge did not believe what he was saying. He was denied access to counsel, denied any opportunity to defend himself, or to attempt to establish the truthfulness of his testimony. Since the proceeding was a "grand jury" under Michigan law, the entire proceeding was conducted in secret. Further, the witness was denied access to any complete transcript of the proceedings. A

case entirely determined on controverted facts which witness was not allowed a fair opportunity to present his facts or challenge "facts" which had been presented by others.

In the instant case quite a different scenario is presented. A first degree murder trial was in progress. The defendant sought disclosure of certain information. A hearing was held outside the presence of the jury which necessitated its being in chambers. Petitioner was represented by counsel at all times. The Court determined, after having heard from all concerned, that the petitioner must disclose the name of his informant. The petitioner was brought back before the court where he was first given an opportunity under oath to voluntarily disclose the informant's name. He refused. The Court then directly ordered him to answer the question and give the name. Although his manner was quite respectful he openly defied the authority of the Court and refused to answer. It was then that the Court found him in contempt.

The actions of the Court and the reasons therefore were immediately public information through the press.

Oliver had not, in any way, challenged the authority of the Court. Mr. Pennington, on the other hand, was directly challenging the authority of the Court. His contemptuous act was his refusal to answer a question under oath when so ordered by the Court. There is no dispute that he did that. No fact is controverted. Only the applicable law is controverted and that would not be the proper subject of a separate hearing except on appeal which is exactly the procedure followed.

Indeed, the crux of this case is a challenge to the authority of the Court to order a newsman to divulge his confidential source. If the Court wrongly applied the law then its judgment should be reversed and Mr. Pennington freed from any punishment. If, on the other hand, the correct law was applied then his *act* was contemptuous and the punishment should be executed.

The only thing that would excuse the behavior of a witness who refused to answer a question when ordered to do so would be a legal right or privilege (such as a Constitutional privilege) to not answer, when, as here, it is questioned whether such a right exists.

CONCLUSION

For the reasons stated we believe there is no issue raised here having sufficient legal merit to justify this Court's review and request that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Gene M. Olander
District Attorney

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Assistant District Atty.